STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

MIDWEST GENERATION, LLC	:	
	:	
v.	:	
	:	
COMMONWEALTH EDISON COMPANY	:	Docket No. 01-0562
	:	
Complaint as to unjust, unreasonable, and anti-competitive energy and capacity charge for station power, request for refunds, with interest, and other relief.	:	

COMED'S MOTION TO DISMISS

Commonwealth Edison Company ("ComEd") respectfully moves to dismiss the Complaint filed herein by Midwest Generation, LLC ("Midwest").

Midwest's Complaint is meritless, both legally and factually. Midwest says that, as a condition of buying generating units, it was forced by ComEd into an onerous contract of adhesion, under which it was required to pay excessive prices for station power. Complaint, ¶2. The picture Midwest paints is completely false. Midwest falsely asserts that ComEd required it to purchase its retail supply of station power directly from ComEd. No such requirement was imposed. No onerous costs were imposed. Moreover, Midwest requests unjustified and unjustifiable relief, including refunds of all payments made for energy which Midwest undeniably used. Midwest also asks, prospectively, for service on unclear terms that may be contrary to both federal and state law. Some of these issues are, of necessity, raised by Answer. Pursuant to the scheduling order, ComEd files this Motion contemporaneously with its Verified Answer. However, the submission of ComEd's answer does not waive ComEd's vigorous objection to the legal flaws of the Complaint.

The Complaint, taken on its face, fails to justify the relief being sought. It requests relief that is legally barred, unlawful, and outside the scope of the Commission's jurisdiction. Alternatively, the facts pled in the Complaint demonstrate that the relief requested is not warranted. Those flaws are the subject of this Motion.

INTRODUCTION AND SUMMARY

Midwest asks the Commission to find unjust, unreasonable and anti-competitive the December 1999 Memoranda of Understanding (the "MOUs") under which ComEd supplies "station power" at retail for end-use functions at the fossil generating stations that Midwest bought from ComEd (the "Fossil Stations"). Midwest asks the Commission to order ComEd to refund, with interest, approximately $25 million -- the entire amount Midwest has paid under the MOUs from December 1999 through June 1, 2001 for energy Midwest undeniably used. The sole basis of the Complaint is that in 2001, almost one and a half years after the MOUs were executed, the FERC issued a series of decisions in a PJM[†] docket, holding that a generator may self-supply the station power needs of one of its plants with energy produced at another of its plants, if it pays all applicable delivery service charges.

The remedies Midwest seeks are legally improper. Contrary to Midwest's claim, the MOUs are not tariffs filed with the Commission, subject to Commission review under Article IX of the Illinois Public Utilities Act (the "Act"), but are rather agreements to provide "contract service" within the meaning of Section 16-102 of the Act. As such, they are competitive service contracts that are not subject to the ratemaking provisions of Article IX. No finding that they are

[†] The Pennsylvania-New Jersey Maryland Interconnection, or "PJM," is a tight power pool that in effect purchases from, and delivers energy to, generators. See PJM Interconnection, L.L.C., Docket No. ER00-3513-002; New York State Electric & Gas Corporation, Docket No. EL99-86-001; Dunkirk Power, LLC, Huntley Power, LLC, and Oswego Harbor, LLC, Docket No. EL00-113-001. The PJM matter was the lead case.

unjust, unreasonable or discriminatory, and no refund remedy, is available under Illinois law. Midwest also fails to allege that it has taken actions prerequisite to filing this Complaint. Midwest has not requested or engaged in arbitration, as the MOUs unambiguously require.

In addition to these jurisdictional flaws, the well-pled allegations of the Complaint show that Midwest is not entitled to relief. Even were it true that Midwest was "forced" into the MOUs as a condition of purchasing the Fossil Stations -- an allegation that ComEd strongly denies -- the Complaint shows Midwest to be a large and sophisticated utility affiliate that voluntarily entered into a multi-billion dollar station purchase transaction. The Complaint does not allege that ComEd refused to offer Midwest open access service to which it was entitled under Illinois law. Nor does it allege that the purchase transaction as a whole was anything other than a fully negotiated and consensual agreement. As the dates in the Complaint, and in the referenced Commission proceeding for approval of the sale demonstrate, negotiations went on for months. Midwest was represented by a team of lawyers from Skadden Arps. Midwest bargained hard and won concessions. Midwest's Complaint alleges nothing to the contrary.

Midwest's arguments that the terms of the MOUs are "unjust and unreasonable" and thus warrant a full refund are without basis, even if one accepts the facts alleged in the Complaint, for two reasons. First, the MOUs provide Midwest the economic equivalent of the self-supply of station power that Midwest claims to want. The Complaint acknowledges that ComEd has been providing service under the MOUs since December 1999. During that time, ComEd has supplied and delivered hundreds of thousands of MWhs of energy. Second, the energy that Midwest now claims it should have been able to use to self-supply its own load is the same energy that Midwest already sold to ComEd or to some other party. Midwest's request for a full refund of all amounts paid would leave ComEd with ***no*** compensation for the energy it

provided, and would permit Midwest to "self-supply" its station load with energy that it already sold to another party. There is no legal justification whatsoever for such a remedy.

Finally, the Complaint does not allege that, at any time since the FERC's PJM decisions of this year, Midwest has even asked ComEd to provide the applicable tariffed delivery services required to allow Midwest to remotely self-supply energy to one station from another. Even Midwest acknowledges that the obligation to pay for delivery services will persist if the MOUs are terminated. Moreover, contrary to Midwest's assertion that ComEd is earning "windfall" profits from the MOUs, the retail energy and capacity supply provisions of the MOUs are of no economic value whatsoever to ComEd. ComEd is willing to consider modifying or terminating the MOUs and allow Midwest to take delivery services in accordance with non-discriminatory terms of its delivery services tariffs filed under Illinois and federal law.

BACKGROUND

In December 1999, after receiving authorization from the Commission (Docket Nos. 99-0273 and 99-0282 (consol.) (August 3, 1999), ComEd sold to Midwest the "Fossil Units," having capacity totaling over 9,000 MWs. Midwest and ComEd also entered into FERC-jurisdictional power purchase agreements (the "PPAs"), under which ComEd is entitled to purchase the capacity and energy of the Fossil Units through 2004. Finally, on December 15, 1999, the parties entered into a series of Memoranda of Understanding (the "MOUs") in which ComEd undertook to supply the Fossil Units with "station power," that is the capacity and energy that every generating station needs for lighting, HVAC and other end-use loads.[†]

[†] FERC defined "station power" as "the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings of a generating facility's site, and for operating the electric equipment that is on the generating facility's site. PJM Interconnection, LLC, 94 FERC ¶ 61,251 at 61,889 (hereafter "PJM II"); order denying reh'g, 95 FERC ¶ 61,333 (2001) ("PJM III").

The Complaint alleges that as a condition of selling the Fossil Units, ComEd, motivated by anti-competitive intent, "forced" Midwest to purchase station service directly from ComEd under the MOUs. Complaint, ¶¶ 2-4. While ComEd strongly denies this allegation, for the purpose of this Motion it is sufficient to note that Midwest rests its Complaint on rulings made by the FERC almost one and a half years after the MOUs were executed and ComEd began providing service under them. In PJM II and PJM III, decided in March and June of 2001, respectively, the FERC held that a generator with more than one generating facility was entitled to remotely self-supply power from one facility to another to meet its station power needs, so long as it agreed to pay all applicable transmission and distribution charges. Midwest also argues that the MOUs are discriminatory and anti-competitive based on Midwest's belief that ComEd's generation affiliate and other independent generators are allowed to remotely self-supply station power at their generating facilities on ComEd's system.

Erroneously believing the MOUs to be filed rates, Midwest asks the Commission to find that they are unjust, unreasonable and anti-competitive, and to order ComEd to pay refunds, with interest, of the entire approximately $25 million. Midwest also asks the Commission to order "netting" of station service on a monthly basis, which it wrongly says was approved by the FERC in PJM Interconnection, LLC, order on rate change application, 95 FERC ¶ 61,470 (2001)("PJM IV").[†]

[†] In a parallel complaint simultaneously filed with the FERC, Midwest makes generally the same factual allegations and legal arguments. It asks the FERC to terminate the MOUs and to order ComEd to allow "netting" of station service on a monthly basis. On September 10, 2001, ComEd requested that the FERC hold proceedings in abeyance pending action on the Complaint filed with the Commission.

ARGUMENT

A. ComEd Provides a Competitive, Not a Tariffed, Service to Midwest Under the MOUs; Midwest's Request for Commission Review of, and Refunds with Respect to, these Competitive Contracts is Legally Improper.

Midwest states that it understands that the MOUs have been filed as rates with the Commission, and argues that the Commission, therefore, has jurisdiction to find them unjust and unreasonable and to grant refunds of all charges paid under them under Section 9-101 of the Illinois Public Utilities Act (the "Act"). Complaint, ¶ 5. Midwest is mistaken on both counts.

ComEd did not file the MOUs with the Commission.[†] ComEd did not file these contracts for good reason -- the services being provided under them are not tariffed services, but rather competitive services. As Midwest alleges, the services provided are bundled retail electric service at terms defined in an agreement between an electric utility and a retail customer. This is "contract service" within the meaning of Section 16-102 of the Act. 220 ILCS 5/16-102 (defining "contract service"). Section 16-102 provides that contract service is a form of "competitive service," and is not to be considered a tariffed service under the Act. Id. (defining "competitive" and "tariffed" services).

Section 16-116(b) of the Act establishes the framework for Commission oversight of electric utilities providing competitive, non-tariffed services. It provides that the electric utility need not file contracts for competitive services with the Commission, or seek approval of them. It provides that the Commission may not increase or decrease the prices nor alter nor add to the terms and conditions agreed to by the parties. Finally, it exempts such contracts from the Commission's ratemaking jurisdiction under Article IX of the Act, except to the limited extent

[†] The Commission may take notice of its own filings. This is especially appropriate were, as here, Midwest does not allege that the MOUs were filed, only that they believe that they were filed. Complaint, ¶ 5.

such jurisdiction may apply to alternative retail electric suppliers under certain provisions of Article XVI. This bright line is reinforced by Section 16-101 which provides that, except where modified or inconsistent with Article 16, other provisions of the Act such as Article IX, are fully and equally applicable to tariffed services electric utilities provide. 220 ILCS 5/16-101.

Based upon the allegations of the Complaint, it is plain that the MOUs are contracts for competitive services not subject to Article IX, and not subject to a finding that they are unjust and unreasonable under Section 9-101 of the Act or to the ordering of refunds of charges. Rather, the General Assembly determined that parties to these contracts should be able to pursue their own commercial interests. Similarly, they are not subject to a finding that they are unduly discriminatory under Section 9-241 of the Act. Midwest's argument that the MOUs are "anti-competitive" is simply a claim that they grant a preference to others by imposing a discriminatory burden on Midwest, in contravention of Section 9-241. Because the MOUs between Midwest and ComEd constitute competitive service, they are no more subject to findings of unjustness, unreasonableness or discrimination than if they ran between Midwest and any alternative retail electric supplier.

Therefore, to the extent that the Complaint seeks a finding that the charges under the MOUs are unjust, unreasonable and anti-competitive, and that past charges should be refunded, the Complaint should be dismissed for want of jurisdiction. The arguments adduced below, however, demonstrate that even if the MOUs were tariffs filed with the Commission under Article IX of the Act, the requested relief would not lie, because Midwest has alleged no factual basis for finding the MOUs unjust, unreasonable or discriminatory or for ordering refunds of charges paid under them.

B. The MOUs Are Subject To Mandatory Arbitration.

This Complaint is also presently outside of the Commission's jurisdiction for a second reason: the MOUs expressly provide that any dispute as to their interpretation or validity must be submitted to binding arbitration in Chicago. Midwest alleges no factual reason why this provision is unenforceable, or should not be enforced. ComEd understands it may be the Commission's position that such mandatory arbitration provisions do not deprive the Commission of its Article X complaint jurisdiction, but ComEd does not waive its legal claim that Midwest has violated the MOUs in filing the Complaint. Moreover, because the MOUs are competitive service contracts, and not rates, the arbitration provisions are enforceable even under this view of the Commission's Article X jurisdiction.

C. Midwest's Claims that the Recent FERC PJM Decisions Render the MOUs Unjust And Unreasonable Are Legally Meritless.

Midwest's claims that the MOUs are "unjust and unreasonable" are premised on the argument that Midwest is entitled, under applicable FERC decisions, to escape from a commercial contract that obligates it to purchase station power from ComEd.[†] Of course, nothing in that contract, or in any of the PJM decisions, holds that a contract to purchase station power from a utility is improper, unjust, or unreasonable. Rather, the PJM decisions make clear that, nationally, generators may have other supply options, including self-supply. While ComEd maintains that it would have permitted those options, under Illinois law, even in 1999, resolution of that factual dispute is not required to dismiss Midwest's claim. The essence of Midwest's

[†] Those FERC decisions are the sole basis on which Midwest claims that the MOUs are unjust and unreasonable. Midwest makes no allegation that ComEd violated, or that the MOUs violate, some substantive provision of Illinois law (e.g., that they were denied access to delivery services that ComEd was obliged to offer under Section 16-104).

argument is that because Midwest alleges that it was not offered those same choices in 1999, it should be able to now void the perfectly legal choice that it made then. Nothing in state or federal law supports this result.

The MOUs are not unlawful under any standard. They were negotiated in good faith and executed in December 1999. Midwest identifies the FERC's decision in PJM II, an order not issued until March 2001, as the only basis for ComEd's alleged wrongdoing. Needless to say, ComEd had no knowledge of PJM II in 1999 and neither did Midwest. Moreover, nothing in any of the PJM decisions stands for the proposition that a generator's otherwise lawful prior agreement to purchase station power is somehow, after the PJM decisions, unjust and unreasonable, and therefore "voidable" at the generator's option. Put bluntly, even if all of Midwest's allegations are taken as true, they do not and cannot allege that there was anything unjust or unreasonable in the MOUs at the time Midwest and ComEd agreed to them, almost a year and a half before PJM II was issued. The PJM decisions simply did not purport to void existing contracts to which parties had voluntarily agreed.

What is more, state law is not silent on this subject -- it plainly disfavors Midwest's position of retroactive contract reopening. When it considered the advent of open access, the General Assembly was aware that utilities had entered into many existing service contracts with customers which, if the customer had a "second bite at the apple" might have been negotiated differently. Yet, the General Assembly made clear that in such cases, the contracts were not to be disturbed. 220 ILCS 5/16-129.

This is fatal to Midwest's claim. Midwest alleges no violation of Illinois law other than that the contracts are supposedly unjust and unreasonable by virtue of their supposed violation of the PJM decisions. Even if Midwest's false allegation that the MOUs were an

integral part of the sale of the Fossil Stations were true, Midwest's argument would fare no better. In that case, Midwest would be seeking to improperly cancel the negotiated price for one part of the transaction while leaving the negotiated price for the remainder of the transaction unaltered.

D. Midwest's Claim that the MOUs are Anti-Competitive Or Cause Economic Harm to Midwest Are Meritless.

Midwest claims that the MOUs are anti-competitive because ComEd, its affiliate Exelon Generation and all other IPP generators on ComEd's system are allowed to remotely self-supply their station power needs, while Midwest alone bears the heavy economic burden of millions of dollars of station power charges per year, rendering it difficult for Midwest to compete. Complaint, ¶¶ 3-5. There is no truth to these claims. However, based on the allegations of the Complaint alone, such claims are patently meritless.

The MOUs provide the financial equivalent of the self-supply option. The MOUs charge Midwest the same energy price as Midwest charges ComEd under the PPAs. In the negotiation of the MOUs, ComEd attempted to accommodate Midwest by structuring the station power transactions so as to provide the financial equivalent of the "netting" of station power that Midwest sought, while recovering payment for Midwest's use of ComEd's transmission and distribution facilities. Thus, under the MOUs Midwest purchases from ComEd retail capacity and energy to serve the stations at the same price at which Midwest sells capacity and energy to ComEd at wholesale under the PPAs.

This fact has two important implications. First, because Midwest can receive from ComEd the same energy price for a MWh delivered to ComEd as it pays for that MWh under the MOUs, the MOUs provide for "virtual self-supply." Midwest should be economically indifferent as to whether it purchases its station power under the MOUs or remotely self-supplies

the energy in accordance with the recent FERC PJM orders. Of course, under the MOUs, Midwest pays the applicable transmission and distribution charges. However, this cannot be unjust or unreasonable. The Act, as well as the FERC PJM decisions, require retail users to pay such charges.

Second, it is clear that Midwest cannot get a "better deal" by impermissibly seeking to avoid transmission and distribution charges. In accordance with the PJM decisions and Illinois state law, were the MOUs terminated, Midwest would still be required to compensate ComEd fully for use of its system through FERC-jurisdictional transmission charges under ComEd's Open Access Transmission Tariff ("OATT") and delivery services charges under the jurisdiction of the Commission, in this case ComEd's Rate RCDS. In PJM III, the FERC made plain that merchant generators should be able to remotely self-supply station power "[a]s long as merchant generators appropriately compensate third parties for the use of any of the third parties' transmission and/or local distribution facilities needed for remote self-supply." Slip Op. at 17 (emphasis supplied). The FERC also made plain that for this purpose: "As for the appropriate 'retail delivery service tariffs' to be used in providing local distribution service, that is a matter for a state regulatory authority to determine." Slip Op. at 9 (emphasis supplied).[†] ComEd's delivery services rates, including Rate RCDS and various riders, apply to unbundled retail delivery services provided to Midwest.[‡]

[†] When a generating unit is operating, it can self-supply its station power without a delivery services charge except where, because of the configuration of the unit, such self-supply involves use of ComEd's system. Similarly, the Commission found that where a generating facility could not locally self-supply station power, because of its configuration or otherwise, it would have to purchase its station power at retail. PJM II, Slip Op. at 26 (around note 67).

[‡] Midwest has challenged certain aspects of the design of these rates in ComEd's current delivery services rate case, Docket 01-0423. Those questions are not at issue here. Midwest does not contest that State rates apply, whatever their design may ultimately be.

E. The Request For Refunds Is Without Merit.

The real gravamen of the Complaint is not Midwest's desire to have the MOUs declared unjust and unreasonable so they can be terminated. The Complaint is really about Midwest's claim that because the MOUs are unjust and unreasonable, Midwest should obtain a refund of the entire amounts paid from December 1999 to date – some $25 million through June 1, 2001 – plus interest. Setting aside the fact that competitive service does not come within Article IX of the Act and thus charges for competitive service are not subject to refund orders, Midwest lacks even a good faith factual basis for this claim for refund.

Midwest admits that ComEd has been supplying station power to Midwest's plants under the terms of the MOUs since December 1999. Midwest's argument that ComEd should receive no payment for these services provided over a period of almost two years pursuant to agreement between the parties is utterly without foundation. As explained above, even under Midwest's theory of its entitlements, Midwest has not been economically harmed. This is so because the structure of the MOUs provides Midwest with the economic equivalent of self-supply, since under them ComEd provides Midwest with station power at the same price at which ComEd buys the output of the plants from Midwest.

But the full illegality of Midwest's request for refunds is underlined by the central fact that the power that Midwest now claims it should have been allowed to use to supply its own station power needs is power that Midwest already sold. Midwest cannot both use the power itself and sell it to ComEd. Under the PPAs, ComEd is entitled to the net dependable capacity of the Fossil Units, defined as the gross capacity of a unit less the unit capacity used for that unit's station service. Appendix A of the PPAs filed by Midwest with the FERC in FERC Docket Nos. ER00-3230-000 et al. ComEd has been paying Midwest for that amount of power. Remotely self-supplying a shut-down station from a second station (or a shut-down unit from another unit

at the same station) would reduce the amount of power ComEd buys from the station, and thus the amount of Midwest's compensation, under the PPAs. Equally unfounded is Midwest's claim that it should receive a refund of the amounts paid under the MOUs for transmission and distribution service, services for which the PJM decisions make plain ComEd must still be compensated if Midwest remotely self-supplies station service.

Because the amounts that Midwest has paid ComEd for station power since December 1999 are payments for service rendered pursuant to lawful contracts between the parties and because the power Midwest now claims it should have been able to use to supply its own station power needs was power that Midwest sold to ComEd, and because Midwest would have had to pay ComEd for transmission and distribution in any case, Midwest's claim for refunds would have to be rejected as utterly without merit even if refund jurisdiction existed in this case, which it does not.

F. Midwest's Request For "Monthly Netting" Is Also Meritless.

The "netting" that Midwest seeks to do on a monthly basis is distinct from self-supply of station power, whether on-site or remote. It refers to the situation when the output of a single generating unit is fluctuating, such as during start-up or shut-down, so that at some point in the process its net output will be less than its station power load and at another point it will be greater. The FERC found in PJM II that "we have never required that net output be measured on a real time or second-by-second basis, but rather have taken the practical point of view that net output should be measured over a reasonable time period, so as to take into account fluctuations in electric production." Slip Op. at 24. Again, the FERC said: "We emphasize that a generator may net against its gross output as measured over a specific time period, typically one hour." Id. at 22. In the case before it FERC found: "PJM has chosen a one-hour period over which to

measure netting, which is reasonable, since prices in the PJM Interchange Energy Market are determined hourly." Id. at 24. The FERC noted, however, that one hour was not the only reasonable period, and that it might look favorably on utilities proposing longer time periods for netting. Id.

Midwest requests that the Commission order ComEd to allow Midwest to net on a monthly, rather than an hourly, basis. Midwest argues that its "proposal is consistent with FERC's recent ruling that upheld a proposal for monthly netting of station service," citing PJM Interconnection, LLC, 95 FERC ¶ 61,470 (200)(PJM IV). Complaint, ¶ 6. Midwest's argument is without merit.

The question in PJM IV was whether the FERC should approve a proposal for voluntary "monthly netting" put forward by PJM in certain circumstances not applicable here, not whether PJM should be required to adopt a month, rather than an hour, as the reasonable period over which fluctuations in a unit's energy output should be measured. Moreover, FERC approved PJM's proposal for "monthly netting" only after determining that what PJM called "monthly netting" would nonetheless apply hourly PJM energy prices and that there would be no free transmission service. 2001 FERC LEXIS 1649, at *17-18. PJM was not proposing to allow generators to net cheap energy from an off-peak hour against expensive energy from a peak hour, as Midwest proposes. As FERC noted in PJM II, a one-hour period over which to measure netting is reasonable because energy prices are determined hourly. PJM II, Slip Op. at 24.

Midwest also argues that FERC's pro forma open access transmission tariff allows customers to net imbalances, and that its prayer for monthly netting is consistent with ComEd's OATT. Complaint, ¶ 6. This is flatly incorrect. ComEd's FERC-approved OATT provides for settlement of imbalances on an hourly basis in cash, and does not permit netting

over multiple hours -- let alone over a month. FERC Electric Tariff, Second Revised Vol. No. 5, Schedules 4A, 4G. Moreover, the Facilities, Interconnection and Easement Agreements between Midwest and ComEd, also filed with and accepted by the FERC, clearly state that Midwest's generator imbalances are measured on an hourly basis. Rate Schedule FERC Nos. 49, 50 and 51, accepted for filing September 3, 1999 in FERC Docket No. ER99-3961-000. For all these reasons, Midwest's proposal for monthly netting is without merit.

CONCLUSION

WHEREFORE, insofar as the Complaint of Midwest Generation, LLC, seeks a finding that the MOUs between Midwest and ComEd are unjust, unreasonable, and anti-competitive, and insofar as it seeks refunds from ComEd, the Complaint should be dismissed for want of jurisdiction or, alternatively, denied for lack of merit. Insofar as the Complaint seeks an Order that ComEd allow monthly netting of station service, the Complaint should be denied for lack of legal merit.

Dated: September 28, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, E. Glenn Rippie, do hereby certify that a copy of the foregoing Motion to Dismiss was served upon all parties on the attached Service List by the method so indicated this 28th day of September, 2001.

E. Glenn Rippie

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